

# U.S. DEPARTMENT OF ENERGY



## OFFICE OF HEARINGS & APPEALS

FY 2011  
ANNUAL REPORT

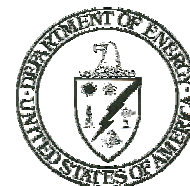


The background of the cover features a large, faint seal of the Office of Hearings and Appeals. The seal is circular and contains an eagle with its wings spread, perched on a shield. Above the eagle is a banner with the word "justitia". The outer ring of the seal contains the text "OFFICE OF HEARINGS AND APPEALS" at the top and "veritas" and "aequitas" on the sides. Below the eagle is a pair of scales of justice.

# OFFICE OF HEARINGS & APPEALS

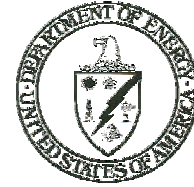
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## MESSAGE FROM THE DIRECTOR...



I am pleased to report on the FY 2011 operations of the Office of Hearings and Appeals (OHA).

OHA's mission is to conduct fair and efficient hearings, and to issue decisions of the Department of Energy (DOE) with respect to any adjudicative proceedings which the Secretary may delegate. OHA's jurisdiction is broad and varied. It has included matters affecting the oil industry, consumers, appliance manufacturers, nuclear licensees, governmental entities, the public in general, and DOE and DOE contractor employees. Each area of jurisdiction supports one or more of DOE's Strategic Themes.

Here are highlights for the past year:

**Alternative Dispute Resolution.** In FY 2011, we were happy to welcome aboard the DOE's Office of Conflict Resolution and Prevention (OCPR), which joined OHA in February 2011. OCPR, formerly a part of the Office of General Counsel, serves as a resource to all DOE components and contractors to explore efficient and cost effective means of preventing conflicts and resolving disputes, without the formalities or costs of litigation.

**Personnel security hearings.** Under DOE's personnel security program, OHA conducts administrative hearings concerning individuals' eligibility for access to classified information or special nuclear material. In FY 2011, our average case processing time fell to its lowest level in any of the last ten years, nearly 25 percent below our average over the last five years, and more than 30 percent below our average for FY 2001-2011. For the third year in a row, we had no cases older than 180 days in our end-of-year inventory. By the end of FY 2011, our average time for issuing a decision after the receipt of the hearing transcript stood at less than 28 days.

**Whistleblower cases.** Under the DOE Contractor Employee Protection Program, OHA conducts investigations and hearings, and considers appeals concerning whistleblower claims filed by DOE contractor employees. We continued processing these cases in a timely fashion in FY 2011. Average processing time stood at a ten-year low, more than 43 percent below the average of the last ten years and 37 percent below our average for fiscal years 2007 through 2011. Also in FY 2011, our office considered two whistleblower complaints filed under the American Recovery and Reinvestment Act of 2009.

**Freedom of Information Act and Privacy Act Appeals.** OHA considers appeals of agency denials of requests for information. In FY 2011, though receiving a higher-than-average number of appeals, our case-processing time was low compared to our historical averages, nearly 25 percent below our most recent five-year average and close to half that of our average from FY 2002 through 2011 (full data at Appendix A, Table 13).



Over the last three years, OHA has reduced its average case-processing time by 25%, while maintaining the professionalism, fairness, due process, and quality of decision-making that has always been the hallmark of our office. In this report, we have highlighted examples of decisions issued by OHA during FY 2011.

You will also notice, throughout this report, examples of our use of video teleconferencing to accomplish tasks, such as conducting hearings, providing training, and participating in meetings, that formerly required our staff to travel to remote locations across the DOE complex. I am particularly proud of OHA's continuing efforts during FY 2011 in utilizing this technology to reduce OHA's carbon footprint, achieve significant cost savings to the taxpayer, in both the time and expense associated with travel, and provide greater flexibility in scheduling hearings, trainings, and other events. Essential to this effort has been the work of our Information Technology Specialist Lee Blackard, who in FY 2011 received the Secretary's Appreciation Award for his invaluable support of this initiative (see page 18).

As we begin FY 2012, we are committed to continued improvement and to meeting any new Departmental needs for adjudicative services. To achieve improvements and be well-positioned to accept new responsibilities, we continue to comprehensively review our operations to identify opportunities for increased efficiency and productivity.

We hope that this report is informative. If you have any comments or suggestions for future improvements, please write or email us.

Sincerely,

Poli A. Marmolejos

## INTRODUCTION

The Office of Hearings and Appeals is the centralized adjudicative forum for the Department of Energy. The Secretary of Energy has delegated to the OHA Director the authority to act for him in many different areas. The Director's decision typically serves as a final agency action.

During its over 30-year history, OHA has had broad-ranging subject matter jurisdiction. Originally OHA's primary function was to consider exceptions and other petitions related to the economic oil regulations, as well as Freedom of Information Act (FOIA) and Privacy Act appeals. From that point onward, OHA's jurisdiction has evolved to meet the needs of DOE's programs.

Over the last decade, OHA has heard appeals from a variety of DOE determinations, including those related to the Department's Alternative Fuel Transportation Program, physician panel reviews of DOE worker occupational illness claims, payment-equal-to-taxes claims under the Nuclear Waste Policy Act of 1982, civil penalties imposed for violations of DOE's worker safety and health rule, and the Elk Hills Oil Field, formerly Naval Petroleum Reserve No. 1.

In FY 2011, OHA continued to conduct personnel security and whistleblower proceedings, consider FOIA and Privacy Act Appeals, and rule on requests for exceptions from the Energy Information Administration (EIA) reporting requirements and from the appliance efficiency standards. With the incorporation into OHA of DOE's Office of Conflict Prevention and Resolution in February 2011, our work now includes promoting the understanding and facilitating the use of Alternative Dispute Resolution (ADR) throughout the Department.

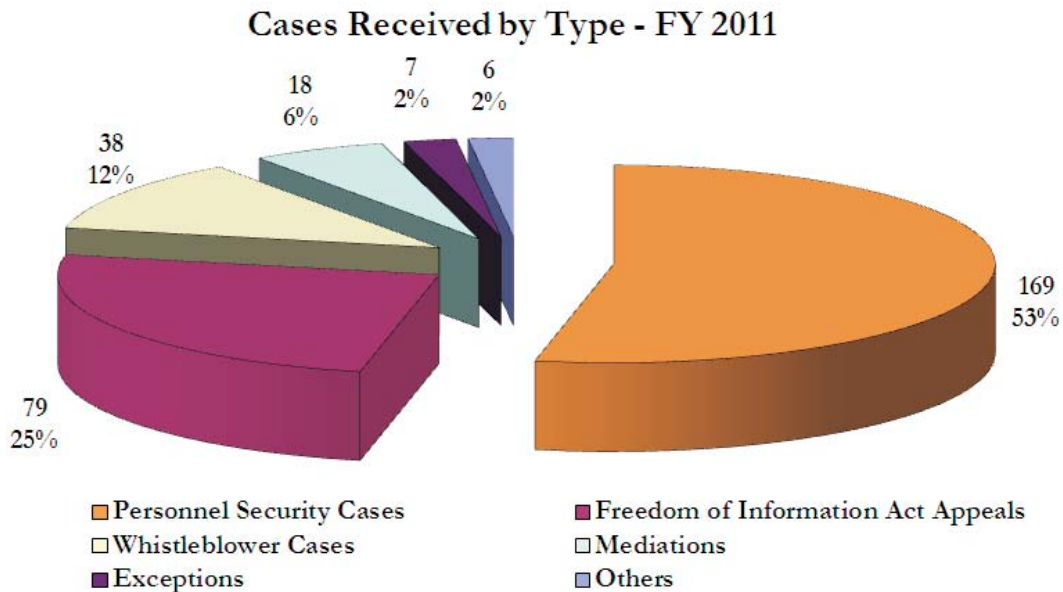
The procedures that OHA uses vary, depending on the type of case involved. OHA procedures are flexible and easily adaptable to new situations, allowing OHA to minimize "start-up" times and to produce high-quality work in new areas, with fast turnaround times. OHA's general procedures and those used for specific proceedings can be found on our web site at [www.oha.doe.gov](http://www.oha.doe.gov), under "Regulations."

In the end, OHA's work does more than resolve disputes. It also serves to inform affected parties and the public about the Department's programs. The decisions produced by OHA reflect the balancing of important and varied interests, including those of the public, the Department, state and local governments, and individual litigants.

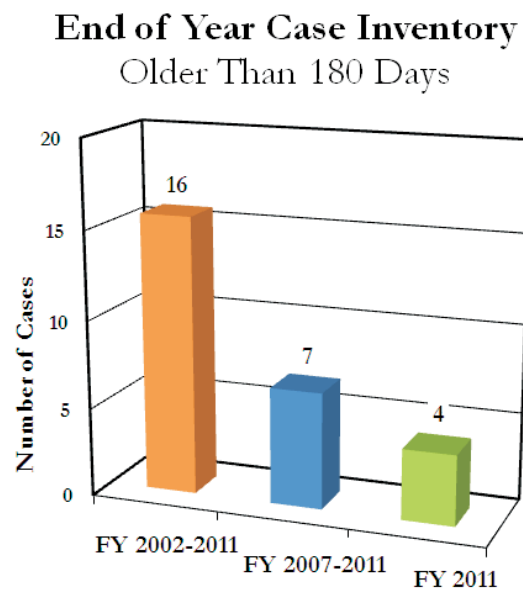
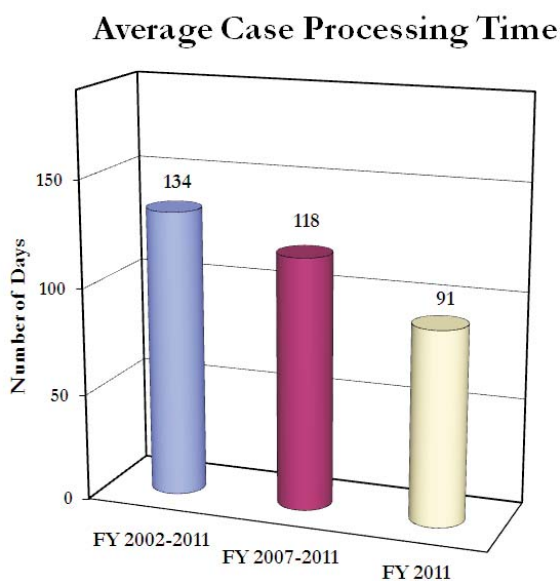


## OVERVIEW OF OHA WORKLOAD

OHA received 317 new cases for processing during FY 2011. The majority of cases received consisted of personnel security hearings (169), followed by FOIA and Privacy Act appeals (79), whistleblower cases (38) (investigations, hearings, and appeals), exception applications, mediations, and others. The following chart shows the volume of cases, by type (full data at Appendix A, Table 1).



The chart on the left below shows the average case-processing time for cases closed in FY 2011, and over the last five and ten fiscal years (full data at Appendix A, Table 2). Though we received more cases in FY 2011 than in any of the last six years, our average case-processing time was over 20 percent below our most recent five-year averages and over 30 percent less than our 10-year average. Over just the last three years, we have reduced average case-processing time by 25 percent. In addition, our inventory of older cases remains near a ten-year low, far below our average over the last five and ten years (full data at Appendix A, Table 3). We attribute these results to a continued emphasis on timeliness.



## I. AREAS OF JURISDICTION

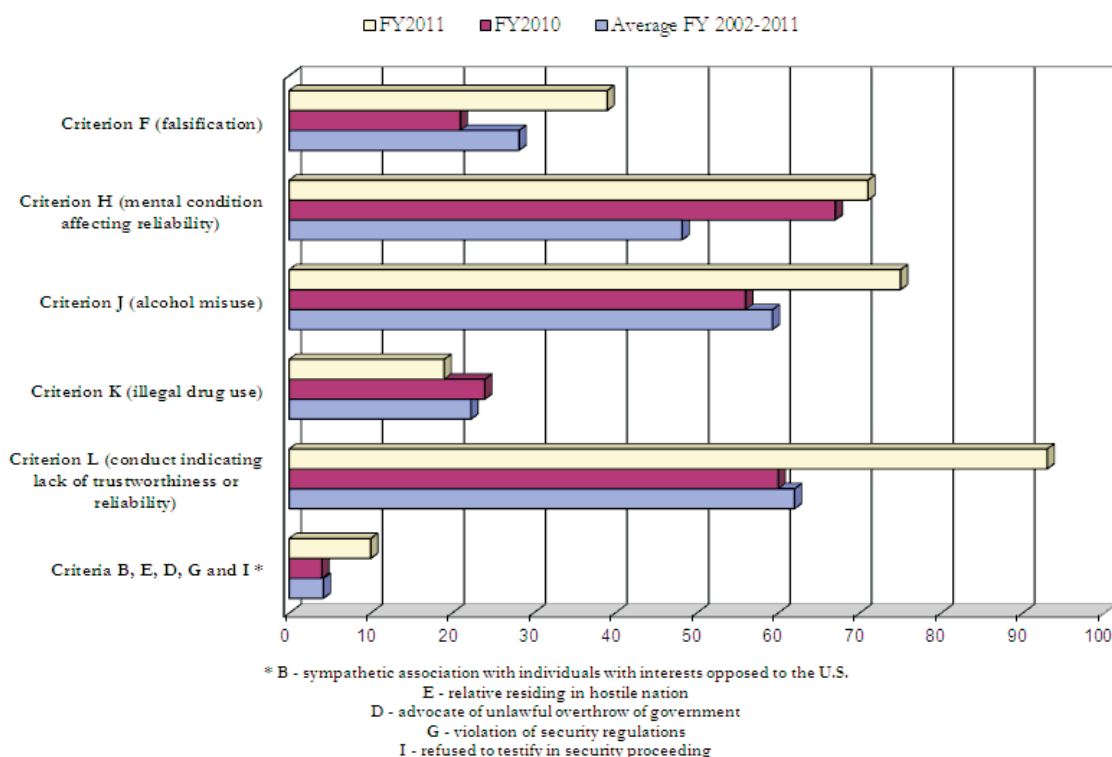
### A. PERSONNEL SECURITY

In FY 2011, 53 percent of cases received by OHA concerned an employee's (federal or contractor) eligibility for a DOE security clearance. OHA also conducts hearings involving eligibility for the human reliability program, a security and safety reliability program for individuals who may have access to certain material, nuclear devices, or facilities. The governing regulations are set forth at 10 C.F.R. Parts 710 and 712, respectively. OHA's web site contains a "Question and Answer" page to assist individuals in understanding the personnel security hearing process.

Personnel security hearings typically involve concerns about excessive alcohol use, substance abuse, mental illness, financial irresponsibility, or conduct raising doubt about an individual's honesty and reliability. Evidence and testimony may include expert medical opinion. The OHA Hearing Officer assigned to the case analyzes the evidence and renders a decision, which may be appealed to an Appeal Panel within the DOE.

The following chart (full data at Appendix A, Table 4) shows the number of cases in which various types of concerns - also referred to as criteria - were raised. Some cases involve multiple criteria. For example, a case may involve a concern about excessive alcohol use (Criterion J) and related or different concerns about honesty and trustworthiness (Criterion L). As the chart shows, consistent with the fact that we received nearly 30 percent more personnel security cases than in FY 2010 (see page 6), there was a significant increase in the number of cases falling under each criterion, with the notable exception of the decrease in the number of cases involving concerns raised by the use of illegal drugs.

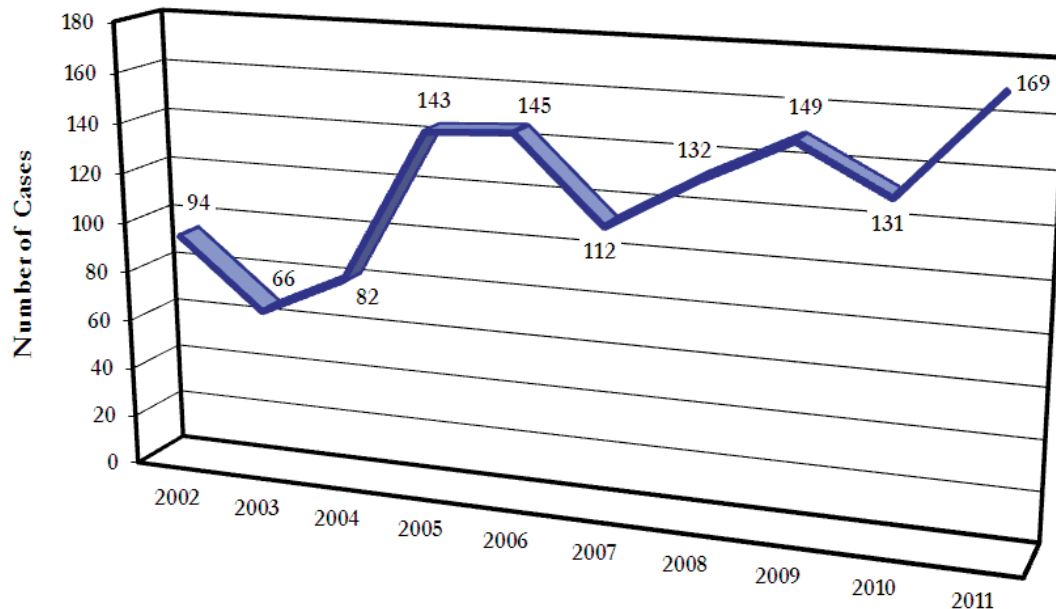
**Criteria Invoked in Personnel Security Cases**





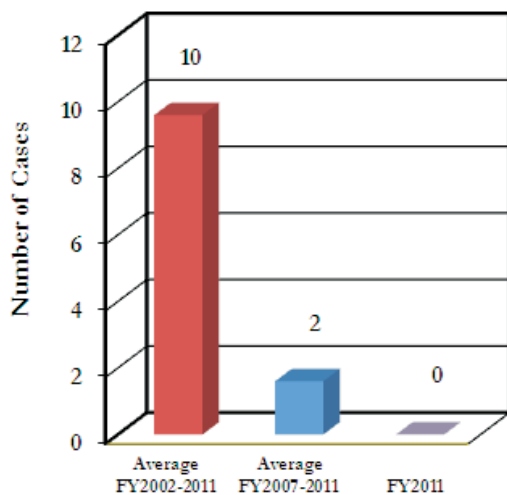
The following chart (full data at Appendix A, Table 5) shows the number of personnel security cases received during each of the last ten years. OHA received 169 personnel security cases in FY 2011, more than in any of the eighteen years that OHA has conducted personnel security hearings.

**Personnel Security Cases Received  
FY 2002-2011**

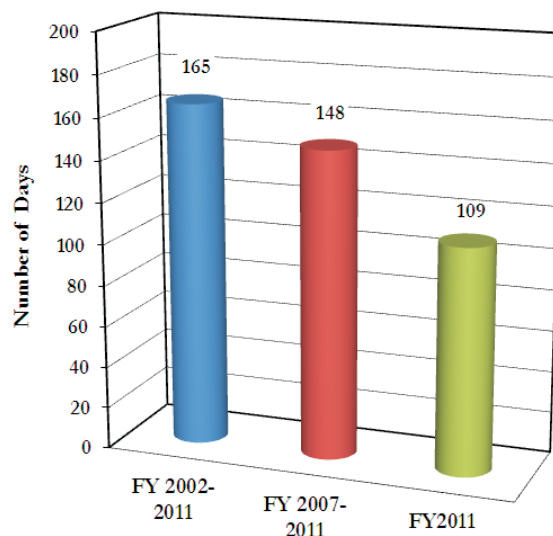


Despite the record number of such cases received in FY 2011, we continued to process personnel security cases in a more timely manner. Average case processing time fell to its lowest level in any of the last ten years, nearly 25 percent below our average over the last five years, and more than 30 percent below our average for FY 2002-2011. At the end of the year, as in FY 2009 and FY 2010, we had no cases in our inventory older than 180 days (full data for charts below can be found at Appendix A, Tables 6 and 7).

**Personnel Security Cases  
End-of-Year Inventory  
Older Than 180 Days**



**Personnel Security Cases  
Average Case Processing Time**



In the area of personnel security, OHA also serves its DOE customers by regularly taking part in, and providing training to, those involved in the Administrative Review process. In FY 2011, the Chief of OHA's Personnel Security and Appeals Division and an OHA Hearing Officer worked closely with the Chicago Operations Office to create and deliver training to that site's attorneys and personnel security specialists on the "Legal Considerations in the Administrative Review Process." This training took place on April 5-6, 2011, in Chicago, and included presentations and discussions on the role of OHA, DOE lawyers, and personnel security specialists in the Administrative Review process, the legal underpinnings of the process, and the drafting of statements of charges. Four OHA Hearing Officers also participated in various sessions via video teleconference from our offices in Washington, D.C.

On June 9, 2011, two OHA Hearing Officers participated, via video teleconference from DOE Headquarters, in a question and answer session with students at the National Training Center's course entitled "Administrative Review Hearing Procedures" being conducted in Albuquerque, New Mexico. The course is a mandatory component of the certification required for personnel security professionals in the Department-wide personnel security program. The Hearing Officers answered questions from the students regarding various aspects of the Administrative Review hearing process, including the role played by personnel security specialists, who are sometimes called upon to testify regarding particular national security concerns.

#### PERSONNEL SECURITY CASE DECISION SUMMARY

##### **Case No. TSO-0993 - Personnel Security Hearing**

On May 12, 2011, an OHA Hearing Officer issued a Decision in which he concluded that an individual's suspended DOE access authorization should not be restored. A DOE Local Security Office (LSO) suspended the individual's security clearance and referred him to administrative review under 10 CFR Part 710.

As a basis for the referral, the LSO alleged that the individual deliberately omitted, concealed or falsified relevant facts on official reports and interviews with the DOE from 1990 until 2009. The LSO further alleged that the individual engaged in unusual and untrustworthy conduct by filing late income tax returns and making late tax payments over 20 years, and by evidencing a 20 year pattern of other financial irresponsibility. Finally, the LSO alleged that the individual failed in his duty to protect classified material by committing security infractions in 1999, 2000, 2007 and 2009.

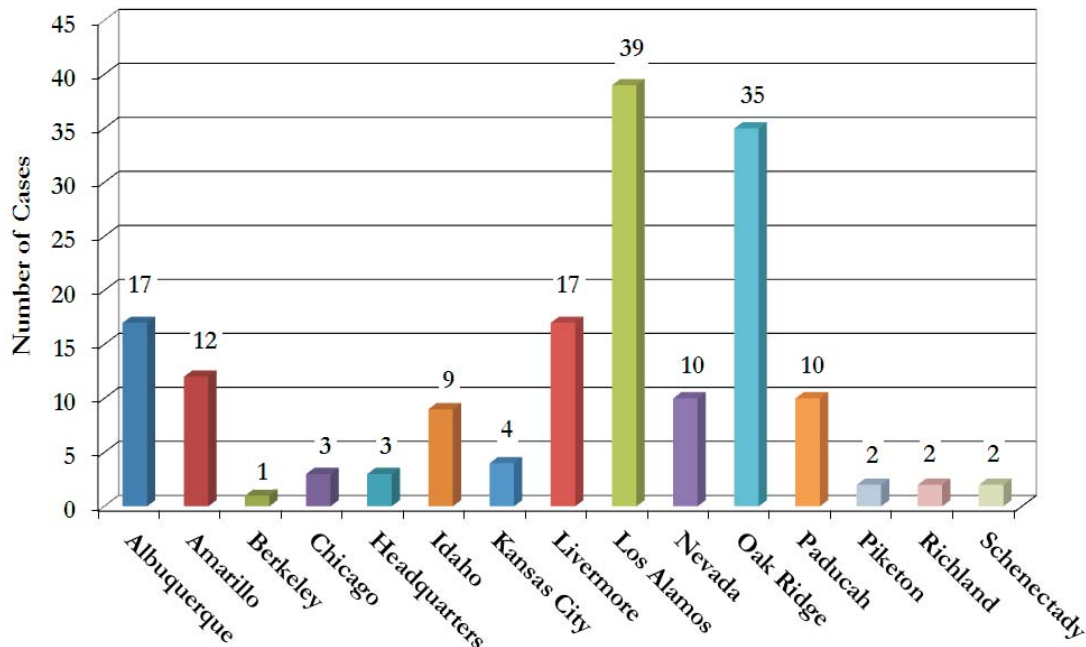
After conducting a hearing and evaluating the documentary and testimonial evidence, the Hearing Officer determined that the individual had not mitigated the security concerns. He found that the individual had repeatedly failed to provide the LSO with derogatory personal information in response to its official inquiries, and that the statements that he made in this context were often inaccurate. He also found that the individual had a 20 year pattern of untimely tax filings and payments and a 20 year pattern of nonpayment or late payments to creditors, that these patterns continued to the present day, and that the individual's explanations failed to mitigate this irresponsible conduct. Finally, the Hearing Officer found that all of the individual's security infractions involved his failure to secure a particular door to a room containing classified information. While the Hearing Officer found that the door had structural problems that prevented it from being effectively secured, he also found that the individual, as the security officer for his program area, had failed to ameliorate the security risk presented by the malfunctioning door in a timely manner.

*The full text of this decision can be found at <http://www.oha.doe.gov/cases/security/tso0993.pdf>.*



## Location of Personnel Security Cases Received in FY 2011

(full data at Appendix A, Table 8)



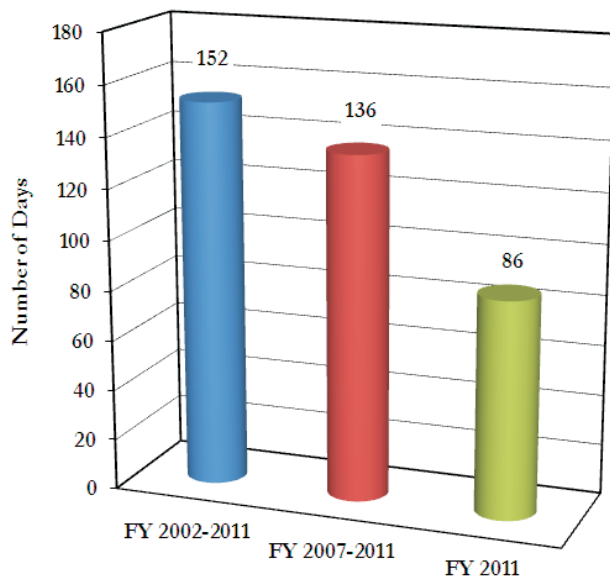
## B. CONTRACTOR EMPLOYEE PROTECTION PROGRAM

OHA investigates complaints, conducts hearings, and considers appeals under DOE's Contractor Employee Protection Program. The program provides an avenue of relief for DOE contractor employees who suffer reprisal as the result of making protected disclosures or engaging in other types of protected activity. The governing regulations are set forth at 10 C.F.R. Part 708. OHA's web site ([www.oha.doe.gov](http://www.oha.doe.gov)) contains three "Question and Answer" sheets to assist DOE field personnel and contractor employees in understanding the process for considering contractor employee reprisal complaints.

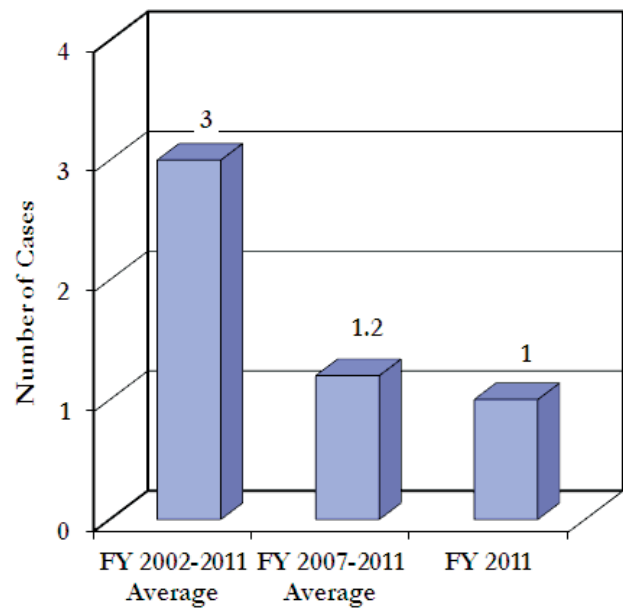
The main issues in these cases are whether an employee engaged in protected activity and, if so, whether the contractor would have taken an adverse action against the employee in the absence of the employee's involvement in that activity. During the investigation, an OHA Investigator conducts interviews, examines documentary evidence, and issues a report. Following the issuance of the Report of Investigation, an OHA Hearing Officer is assigned to the case. The Hearing Officer rules on pre-hearing motions, conducts the hearing, and issues an initial agency decision, which may be appealed to the OHA Director. The OHA Director also hears appeals from dismissals of complaints. His decisions in both types of appeals serve to increase understanding of the program's purpose and implementation. A finding of reprisal for certain types of disclosures may result in civil penalties pursuant to the DOE enforcement programs under the Price-Anderson Act and the DOE Worker Safety and Health Rule (10 C.F.R. Part 851).

During FY 2011, OHA received 36 cases under this program and, as with our other areas of jurisdiction, we continued to focus on timeliness in the processing of these cases. We are pleased with the results of those efforts in the past year, shown in the charts on the following page. Average case-processing time

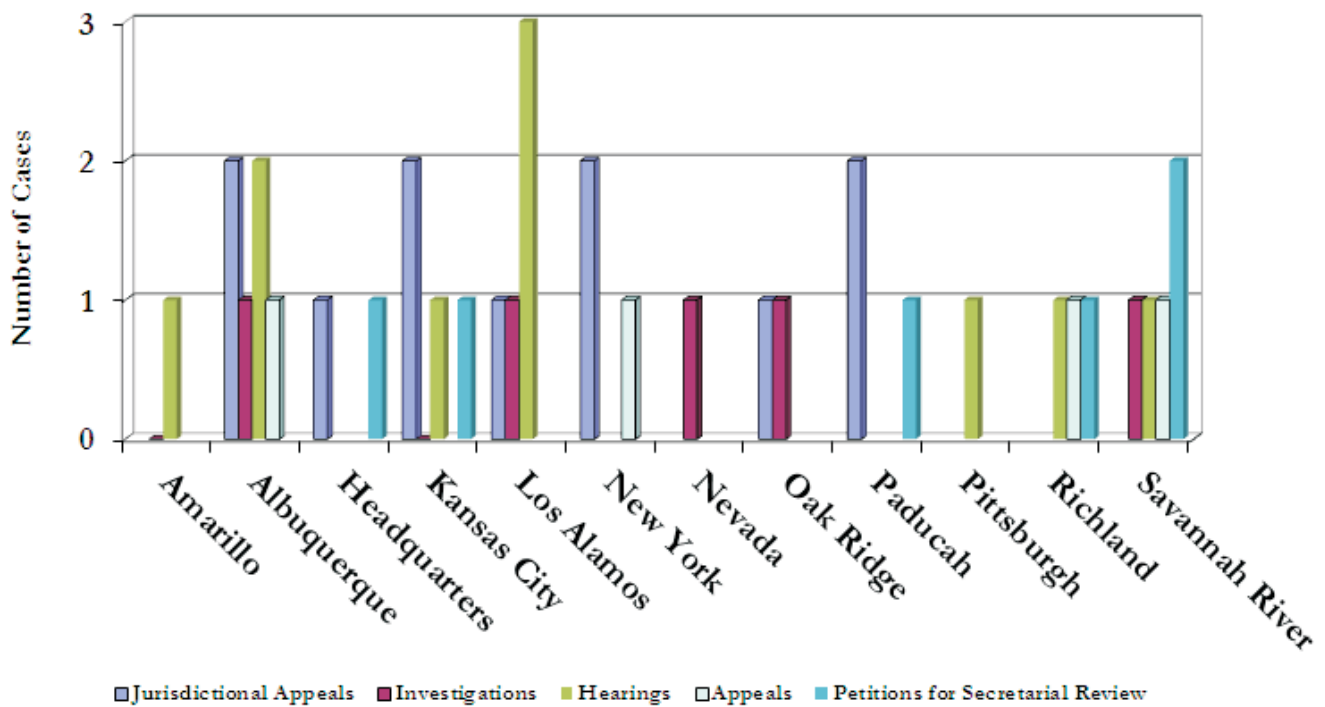
Whistleblower Cases  
Average Case Processing Time



Whistleblower Cases  
End-of-Year Inventory Older Than 180 Days



Location of Whistleblower Cases Received in FY 2011





fell to its lowest of the last ten years, over 43 percent below the average for that ten-year period and 37 percent below our average for FY 2007-2011. In addition, only one case in our end-of-year inventory was older than 180 days, less than our averages of the last five and ten years.

## CONTRACTOR EMPLOYEE PROTECTION CASE DECISION SUMMARY

### **Case Nos. TBU-0117 & TBU-0118 - Gordon Michaels**

On June 3, 2011, the Director of OHA issued a Decision denying an appeal filed by Gordon Michaels under the DOE Contractor Employee Protection Program, set forth at 10 C.F.R. Part 708. Michaels appealed the dismissal of his Part 708 whistleblower complaint by two offices having jurisdiction over the complaint, the DOE's National Nuclear Security Administration Service Center (NNSA/SC) and the DOE's Oak Ridge Office (ORO).

Michaels had been an employee of UT-Battelle, LLC, the firm that manages and operates the DOE's Oak Ridge National Laboratory (ORNL). After retiring from UT-Battelle, Michaels began working at the ORNL site under a contract with Honeywell Federal Manufacturing & Technologies, LLC (Honeywell), which manages and operates the DOE NNSA's Kansas City Plant (KCP). In his complaint, Michaels alleged that UT-Battelle revoked his access to the ORNL site in retaliation for actions, protected under Part 708, that he took while employed by ORNL. NNSA/SC and ORO dismissed the Appellant's complaint, NNSA/SC as to Honeywell, and ORO as to UT-Battelle, both stating that Michaels is not an "employee" as that term is defined in the Part 708 regulations.

In denying the Appeal, the OHA agreed that Michaels is not an employee of either contractor. First, citing a Supreme Court decision interpreting the term "employee" in a federal statute, the OHA determined that it was appropriate to apply a common law test for determining whether Michaels is an "employee" under Part 708. The Appellant did not demonstrate that he was an employee under this test, which considers a hiring party's right to control the manner and means by which a product is accomplished. Moreover, though Michaels was formerly employed by UT-Battelle, he voluntarily retired from the company, and the definition of "employee" in Part 708 includes former employees only where there is an allegation of termination from previous employment.

*The full text of this decision can be found at <http://www.oha.doe.gov/cases/whistle/tbu0117.pdf>.*

The DOE Contractor Employee Protection Program is part of a larger DOE program - the DOE Employee Concerns Program (ECP). The latter is managed by the Office of Civil Rights and Diversity, an office within the DOE's Office of Economic Impact and Diversity.

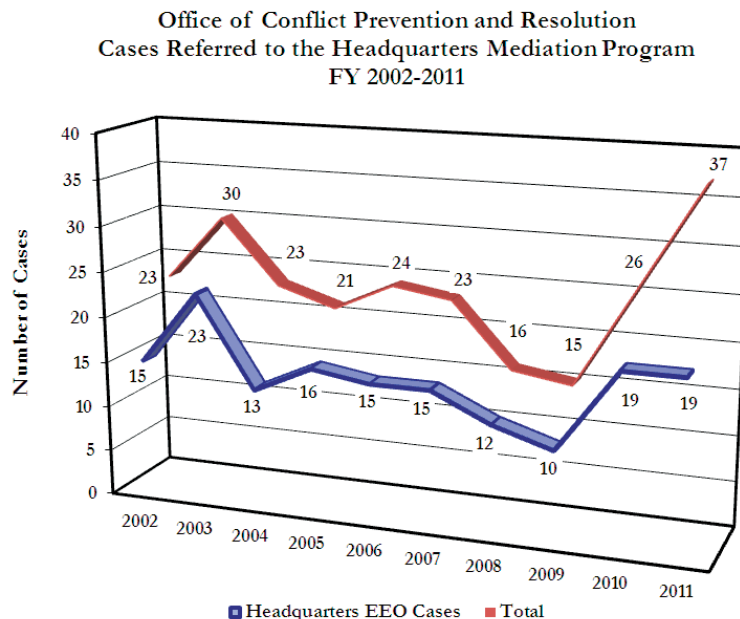
In March 2011, the Chief of OHA's Employee Protections and Exceptions Division, two OHA Hearing Officers, and the Manager of the Office of Conflict Prevention and Resolution Headquarters Mediation Program conducted a training for DOE employee concerns managers across the complex. This training, providing an overview of Part 708 and designed to raise awareness of issues arising under those regulations, was conducted from our offices in Washington using DOE's iPortal web conferencing technology. OHA also conducted, by telephone conference from Washington, a training of employee concerns managers at their May 2011 meeting in Las Vegas. In September 2011, our office partnered with the DOE headquarters employee concerns manager to conduct training, via video teleconference, for the new employee concerns manager at the DOE's Y-12 site in Oak Ridge, Tennessee.

## C. ALTERNATIVE DISPUTE RESOLUTION

Formerly part of DOE's Office of General Counsel, the Office of Conflict Prevention and Resolution (OCPR) joined OHA in February 2011. OCPR serves as a resource to all DOE components and contractors to explore efficient and cost-effective means of preventing conflicts and resolving disputes, without the formalities and costs of litigation.

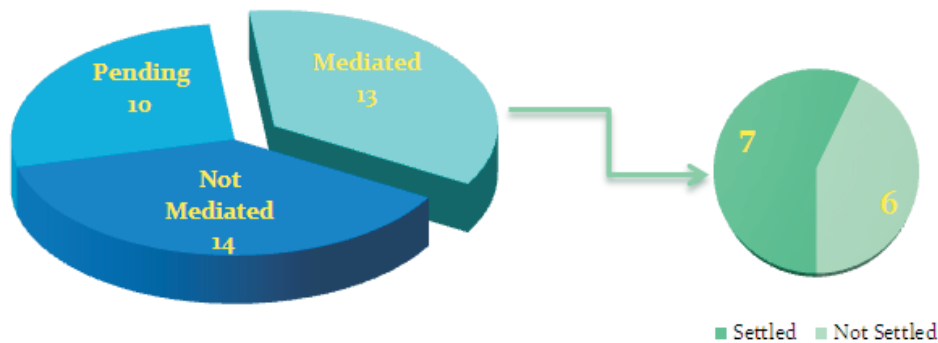
OCPR was created as a result of the Administrative Dispute Resolution Act of 1996 (ADRA), with the mandate to increase the understanding and use of alternative dispute resolution (ADR) within the Department. While ADRA focuses on issues already in controversy, OCPR's mandate was expanded to encourage the identification and prevention of potential conflicts throughout the DOE complex. ADR includes a variety of dispute resolution processes (including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, use of ombuds, or any combination thereof) that assist people in avoiding more polarizing (and, potentially, more costly) forums such as litigation. Mediation is the ADR method that is most often utilized at DOE.

OCPR directs the DOE Headquarters Mediation Program. During FY 2011, the OCPR staff conducted nearly all of the mediations referred to OCPR after joining OHA, and began training OHA staff attorneys to also serve as mediators. This was a significant departure from the prior practice of contracting mediators or retaining shared neutrals from outside of DOE to perform all the DOE headquarters mediations. The Headquarters Mediation Program processed more cases in FY 2011 than in any of the previous nine years – see below chart. The majority of the cases referred to the program are equal employment opportunity cases (most frequently referred from DOE's Office of Civil Rights). As we broadened our outreach and marketing of OCPR in FY 2011, EEO cases represented a much smaller percentage of the program's cases than in prior years.



Mediations were conducted in 13 of the 37 cases referred to OCPR in FY 2011, and a settlement rate of 53% was achieved in those cases, as shown in the chart below. Fourteen cases were not mediated, typically because one party did not wish to proceed to mediation or because the matter was resolved prior to mediation. Ten cases remained pending at the end of FY 2011.

Office of Conflict Prevention and Resolution  
Disposition of Cases Referred to the Headquarters Mediation Program  
FY 2011



In April, Associate Deputy Secretary Williams issued a memorandum reaffirming the Department's support of ADR stating that "DOE strongly supports the use of Alternative Dispute Resolution (ADR) as a way to prevent or minimize disputes, or to resolve disputes at the earliest stage possible, in a timely, cost-effective manner." Admiral Williams' April 2011 memorandum is reproduced at Appendix B. Subsequently, each Departmental Element appointed an ADR Point of Contact (POC) to ensure that ADR is integrated into DOE's workforce processes.

OCPR also supports the DOE Technology Transfer Coordinator and the 22 technology transfer ombudsmen (TTOs) that are located at various sites throughout the DOE complex. The role of the TTO is to assist the public and industry in resolving complaints and disputes with National Laboratories or research facilities regarding technology partnerships, patents, and technology licensing. In FY 2011, OCPR worked with the technology transfer coordinator and the TTOs to develop a "Roles and Responsibilities" document to assist newly appointed TTOs in performing their TTO function. Also in FY 2011, OCPR significantly revised the electronic reporting form for the TTOs to report quarterly activities at their lab or facility. This form is to be completed by the TTOs pursuant to the Technology Transfer Commercialization Act of 2000.

OCPR consults throughout the DOE complex on the potential uses of ADR in environmental controversies. OCPR works with the Office of the General Counsel (GC-51) and the Office of Health, Safety and Security (HS-21) to report annually on DOE's environmental conflict resolution efforts as required by the Office of Management and Budget and the Council on Environmental Quality.

In addition to consulting and developing programs that employ alternative means of conflict prevention and dispute resolution, OCPR designs and delivers training in communication, negotiation and mediation techniques. FY2011 training and outreach activities included:

- ✓ ADR Awareness web-based presentation for ECP Managers – March 2011
- ✓ ADR Awareness teleconference presentation for ECP Managers – May 2011

- ✓ Module on Conflict and ADR at all Forrestal and Germantown “Supervisory Essentials: Strategies for Success!” five-day workshops for managers
- ✓ Basic Mediation Skills Training for OHA Hearing Officers – two separate trainings, May and June 2011
- ✓ ADR Awareness presentation at nine separate “Diversity, EEO and ADR” trainings, mandatory for all NNSA employees
- ✓ Introduction to OCPD and ADR presentation at all new employee orientation sessions at DOE Headquarters
- ✓ ADR Lunchtime Series: OCPD sponsored, in conjunction with the Interagency ADR Working Group, six presentations at DOE Headquarters, featuring ADR practitioners, administrators, and professionals; these sessions are widely attended by both the federal and private sector
- ✓ Co-sponsored (with GC-51 and HS-21) two-day Environmental Training for DOE and contractor counsel with special emphasis on environmental conflict resolution – October 2010
- ✓ Co-sponsored “Facilitation Fundamentals” with the US Institute on Environmental Conflict Resolution – February 2011

## D. FREEDOM OF INFORMATION AND PRIVACY ACTS

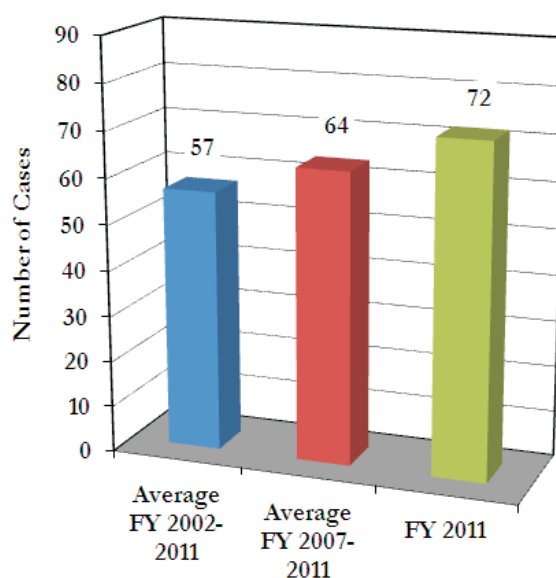
OHA considers appeals of agency determinations under the FOIA and Privacy Act. The governing regulations are set forth at 10 C.F.R. Parts 1004 and 1008, respectively.

These appeals arise from determinations across the DOE complex and involve diverse subject matter areas. OHA facilitates communication between the requester and the agency, which in some cases permits the resolution of the issues without adjudication. OHA works closely with the DOE's FOIA and Privacy Act offices, and participates in complex-wide training.

OHA continues to receive a number of FOIA and Privacy Act appeals by DOE workers seeking exposure and medical records to support compensation claims under the Energy Employees Occupational Illness Compensation Program Act. The Department of Labor administers that program.

As shown in the chart at right, during FY 2011 we received 72 FOIA and Privacy Act Appeals, a higher than average number compared to the averages of the last five and ten fiscal years (full data at Appendix A, Table 12).

**Freedom of Information and  
Privacy Act Appeals  
Cases Received**





FREEDOM OF INFORMATION  
AND PRIVACY ACTS  
CASE DECISION SUMMARY

**Case No. TFA-0453 - Scott Hodes, Esq.**

On March 3, 2011, the Director of the Office of Hearings and Appeals (OHA) denied a Freedom of Information Act (FOIA) Appeal filed by Mr. Scott Hodes, Esq. Mr. Hodes requested copies of the agreements between DOE and several private entities (“the consortium”) concerning Oak Ridge Operations Office (DOE/OR) production of Californium-252, a radioactive neutron with many industrial uses.

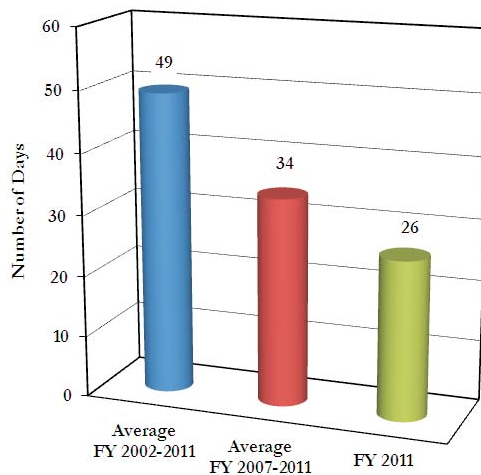
Mr. Hodes made his request in October 2009 to the FOIA Office at DOE Headquarters (DOE/HQ) and to DOE/OR. In August 2010, DOE/HQ released some responsive records to Mr. Hodes and, after contacting submitters for their approval, made a final release in November 19, 2010. However, DOE/HQ withheld some material under Exemption 4 and Mr. Hodes appealed this withholding.

After reviewing the record, OHA found that the material was properly withheld under Exemption 4. OHA further found that DOE was correct in concluding that the withheld material was not trade secret information, the withheld material was commercial and financial, and the withheld material was obtained from a person because the consortium members were the source of the responsive information. Finally, OHA agreed that the withheld material was confidential because its release was likely to cause substantial harm to the competitive position of the consortium. OHA found that release of the information would provide an unfair advantage to competitors of the consortium. Therefore, OHA denied the Appeal.

*The full text of this decision can be found at <http://www.oha.doe.gov/cases/foia/tfa0453.pdf>.*

Despite the relatively high number of cases received, our case-processing time for FY 2011 was low compared to our historical averages, nearly 25 percent below our most recent five-year average and close to half that of our average from FY 2002 through 2011 (full data at Appendix A, Table 13).

Freedom of Information and Privacy Act Appeals  
Average Case Processing Time



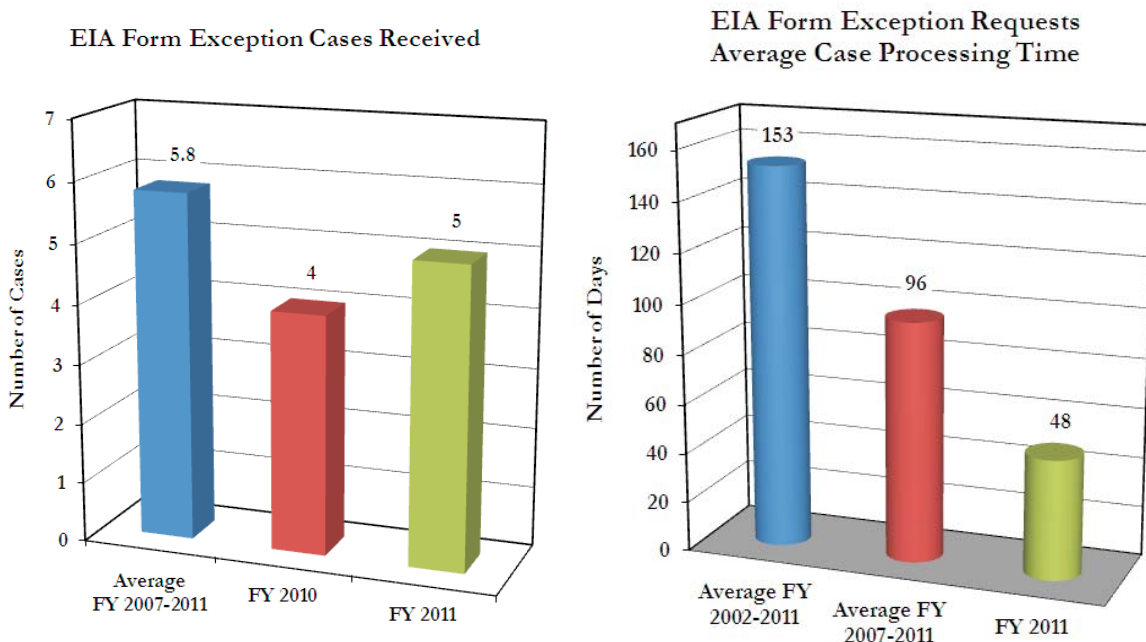
## E. EXCEPTIONS AND SPECIAL REDRESS

OHA considers petitions for special redress, as well as requests for exceptions from certain DOE regulations and orders. Most requests concern the Energy Information Administration (EIA) reporting requirements and the DOE appliance efficiency regulations.

The exception process is a regulatory relief valve. An exception is granted where the application of a rule or order would constitute a gross inequity, serious hardship, or unfair distribution of regulatory burdens. OHA may grant an exception, for example, if applying a rule to a specific firm would be inconsistent with the overall purpose of a program or would impose a burden on the firm that would be grossly disproportionate to the burden imposed on other firms by the rule. In all cases, OHA consults with the affected DOE office.

Over the last ten years, receipts of EIA cases have fluctuated. In FY 2011, EIA suspended its requirements for reporting of product sales data from resellers and retailers, thus impacting the number of EIA cases we received in the past fiscal year. Similarly, appliance efficiency cases tend to increase as the deadline for compliance with a new standard approaches. OHA closed 5 EIA exception cases and 3 appliance efficiency cases in FY 2011.

Despite inevitable fluctuations in the number of EIA form exception cases received, the number of EIA cases received in FY 2011 was comparable to that received in FY 2010, as well as to the average number of cases received annually during the last five fiscal years. Meanwhile, average case-processing time remained at historically low levels, at half of our average for FY 2007-2011, and less than one-third of the average over the last ten fiscal years (full data at Appendix A, Tables 14 and 15).



## EXCEPTIONS AND SPECIAL REDRESS CASE DECISION SUMMARY

### **Case No. TEE-0074 - GE Appliances and Lighting**

On February 16, 2011, OHA issued a decision granting an Application for Exception filed by GE Appliances and Lighting, in which the firm sought relief from the provisions of 10 C.F.R. Part 430, Energy Conservation Program for Consumer Products: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers and Freezers (Refrigerator Efficiency Standards). The firm requested that the DOE allow it to apply an energy efficiency standard for its new automatic defrost refrigerator-freezer with bottom-mounted freezer with through-the-door ice service, based upon the incremental increase in allowable energy consumption properly attributable to its “through-the-door ice service” feature. The firm argued that without the requested relief, it would “suffer serious hardship, inequity and an unfair distribution of burdens.”

In weighing the relative burden of the firm’s compliance with the Refrigerator Efficiency Standards, OHA found that the firm’s model – a “refrigerator-freezer with bottom-mounted freezer with through-the-door ice service” – would be unable to meet the Class 5 energy efficiency standard established for “Refrigerator-Freezers – automatic defrost with bottom-mounted freezer without through-the-door ice service” due to the energy loss inherent in adding the through-the-door ice service feature. OHA determined that if exception relief were denied, GE would be effectively precluded from marketing its product under the generally applicable energy efficiency standard, an unintended consequence of the existing regulations.

*The full text of this decision can be found at <http://www.oha.doe.gov/cases/eia/tee-0074.pdf>.*

## F. ELK HILLS OIL FIELD (FORMERLY NAVAL PETROLEUM RESERVE NO.1)

For over a decade, OHA had a unique jurisdiction concerning the Elk Hills Oil Field, formerly Naval Petroleum Reserve No. 1. For approximately fifty years, Chevron USA and the DOE operated the field as a unit pursuant to a congressionally-approved contract. When the federal government subsequently sold its interest in the field, the parties had not finalized their equity interests in the unit’s production. To resolve those interests, Chevron agreed to give up judicial review in exchange for an agency process that culminated with an appeal to OHA. On May 24, 2011, after being notified that Chevron and the DOE had reached a settlement agreement, OHA dismissed the appeal.

## II. WORKING WITH OTHERS

Over the years, OHA has collaborated and partnered with other DOE offices and federal agencies, and FY 2011 was no exception.

OHA provided adjudicative services in the area of personnel security to the U.S. Nuclear Regulatory Commission (NRC). An OHA Hearing Officer served as an NRC Hearing Examiner in a case regarding the eligibility of an individual for a security clearance under Executive Order 12968, the federal Adjudicative Guidelines, and NRC regulations. After conducting a hearing in the matter, he issued written findings and recommendations in September 2011.

In April 2011, our Personnel Security and Appeals Division Chief and an OHA Hearing Officer worked closely with the Chicago Operations Office to create and deliver training to that site's attorneys and personnel security specialists on the "Legal Considerations in the Administrative Review Process" (see page 7). On several occasions in FY 2011, OHA's Employee Protections and Exceptions Division conducted trainings for DOE employee concerns managers across the complex. In each case, we achieved significant cost savings by conducting the training from Washington using telephone, video, or web conferencing.

Staff from our Office of Conflict Prevention and Resolution regularly participates in activities coordinated among federal agencies, including the Interagency Dispute Resolution Working Group, the Interagency Conflict Management Consortium, and the Environmental Conflict Resolution Policy Forum. In addition, an OCPR Attorney participates on DOE's Tribal Steering Committee.

We continue to learn from our colleagues, and hope that those with a better understanding of OHA and what we do can take advantage of the expertise, resources, and services we offer in support of DOE's mission. In this spirit, OHA continued in FY 2011 its series of Brown Bag Lunches. Our distinguished guests in the past year included:

Dr. Mike Ardaiz, DOE Chief Medical Officer  
Melvin Williams, Associate Deputy Secretary of Energy  
Dr. Karina Edmonds, DOE Technology Transfer Coordinator  
Edward Bruce Held, Director, DOE Office of Intelligence and Counterintelligence  
Melinda Downing, DOE Environmental Justice Program Manager

We look forward to continuing this series in the coming year.

## III. SERVING OUR COMMUNITY

In FY 2011, OHA employees continued their long tradition of generosity to the Combined Federal Campaign, receiving a ninth President's Award for "their extraordinary support of voluntarism" through the CFC.

For the twelfth year in a row, OHA attorneys supported DOE's partnership with the "Everybody Wins!" lunchtime reading program at Amidon Elementary School. Over the course of the fiscal year, six OHA attorneys participated in the weekly reading program. Apart from DOE-sponsored activities, OHA staff members donate their time and skills to their communities in a variety of ways.



## IV. INFORMATION TECHNOLOGY

OHA makes broad use of technology to accomplish its mission. OHA maintains a website where it publishes its decisions and other information. Internally, OHA uses a case management system to record new case filings, track the status of pending cases, produce productivity and case status reports, and assist staff attorneys in the timely resolution of assigned cases.

In July 2011, Secretary of Energy Steven Chu presented the Secretary's Appreciation Award to OHA's Information Technology Specialist Lee Blackard, in recognition of "his management reform initiative in the Office of Hearings and Appeals that resulted in saving significant travel dollars by conducting hearings via video teleconference. During the third quarter of fiscal year 2011, travel expenses decreased 31% from the third quarter in 2010. Fiscal year 2011-to-date travel expenses decreased 41% from the comparable period in 2010."



*Secretary of Energy Chu presents Lee Blackard with the Secretary's Appreciation Award*

By the end of FY 2011, OHA had conducted 68 hearings via video teleconference, 54% of all hearings conducted in the fiscal year, a significantly higher percentage than in FY 2010, when 32% of our hearings were conducted via VTC.

In FY 2011, OHA continued to reduce the space devoted to records storage as part of its plan to transition to a paperless office. Facilitating this transition was our migration to a new case management system that allows for storing and tracking of electronic documents, which each year make up a larger portion of documents in our case files. For FY 2012, OHA plans to further increase its use of electronic filing and case record maintenance.

## V. GENERAL INFORMATION

- ✍ Extensive information is available on our website at [www.oha.energy.gov](http://www.oha.energy.gov). The website includes information about OHA's jurisdiction, including applicable regulations, "Question and Answer" sheets, and OHA decisions.
- ✍ For copies of submissions in OHA proceedings, you may contact the Docket Room at (202) 287-1400. You may also fax your inquiries to (202) 287-1415 or e-mail them to [doretha.colter@hq.doe.gov](mailto:doretha.colter@hq.doe.gov).
- ✍ For general information, you may contact the Office of the Director at (202) 287-1566 or the Docket Room at the number listed above.
- ✍ To give us feedback on this Annual Report or on any aspect of our operations, please email us at [oha.feedback@hq.doe.gov](mailto:oha.feedback@hq.doe.gov). We truly value your observations and suggestions.

## APPENDIX A

### TABLES

Table 1 - Cases Received by Type, FY 2011

Personnel Security Cases	169	53%
Freedom of Information Act Appeals	79	25%
Whistleblower Cases	39	12%
Mediations	18	6%
Exceptions	7	2%
Others	6	2%

Table 2 - Average Case Processing Time (Days)

FY 2002-2011	134
FY 2007-2011	118
FY 2011	91

Table 3 - End of Year Case Inventory Older Than 180 Days

FY 2002-2011	16
FY 2007-2011	7
FY 2011	4

Table 4 - Criteria Invoked in Personnel Security Cases

	Average FY 2002-2011	FY2010	FY2011
Criterion F (falsification)	28.2	21	39
Criterion H (mental condition affecting reliability)	48.2	67	71
Criterion J (alcohol misuse)	59.3	56	75
Criterion K (illegal drug use)	22.3	24	19
Criterion L (conduct indicating lack of trustworthiness or reliability)	62	60	93
Criteria B (sympathetic association with individuals with interests opposed to the U.S.), D (advocate of unlawful overthrow of government), E (relative residing in hostile nation), G (violation of security regulations), and I (refused to testify in security proceeding)	4.2	4	10

Table 5 - Personnel Security Cases Received, FY 2002-2011

Fiscal Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Cases Received	94	66	82	143	145	112	132	149	131	169

Table 6 - Personnel Security Cases, End-of-Year Inventory Older Than 180 Days

Average FY2002-2011	Average FY2007-2011	FY2011
10	2	0

Table 7 - Personnel Security Cases, Average Case Processing Time (Days)

FY 2002-2011	FY 2007-2011	FY2011
165	148	109

Table 8 - Location of Personnel Security Cases Received in FY 2011

Albuquerque	Amarillo	Berkeley	Chicago	Headquarters	Idaho	Kansas City	Livermore	Los Alamos	Nevada	Oak Ridge	Paducah	Pikeston	Richland	Schenectady
17	12	1	3	3	9	4	17	39	10	35	10	2	2	2

Table 9 - Whistleblower Cases, Average Case Processing Time (Days)

FY 2002-2011	FY 2007-2011	FY 2011
152.4	136.4	86

Table 10 - Whistleblower Cases, End-of-Year Inventory Older Than 180 Days

FY 2002-2011 Average	FY 2007-2011 Average	FY 2011
3	1.2	1

Table 11 - Location of Whistleblower Cases Received in FY 2011

	Jurisdictional Appeals	Investigations	Hearings	Appeals	Petitions for Secretarial Review
Albuquerque	1			1	
Amarillo					1
Idaho		3	2	2	
Los Alamos		2	2		
Nevada	1	1	1		
Oak Ridge	2		1	1	2
Paducah					1
Richland					1
Savannah River		1			



Table 12 - Freedom of Information and Privacy Act Appeals Cases Received

Average FY 2002-2011	Average FY 2007-2011	FY 2011
56.9	63.6	72

Table 13 - Freedom of Information and Privacy Act Appeals, Average Case Processing Time (Days)

Average FY 2002-2011	Average FY 2007-2011	FY 2011
49.3	34	26

Table 14 - EIA Form Exception Cases Received

Average FY 2007-2011	FY 2010	FY 2011
5.8	4	5

Table 15 - EIA Form Exception Requests, Average Case Processing Time (Days)

Average FY 2002-2011	Average FY 2007-2011	FY 2011
152.9	96.4	48

APPENDIX B

APRIL 4, 2011, MEMORANDUM FROM  
ASSOCIATE DEPUTY SECRETARY WILLIAMS  
REGARDING ALTERNATIVE DISPUTE RESOLUTION



**Department of Energy**  
Washington, DC 20585

April 4, 2011

MEMORANDUM FOR HEADS OF DEPARTMENTAL ELEMENTS

FROM: M. G. WILLIAMS, JR.  
ASSOCIATE DEPUTY SECRETARY

*M. G. Williams, Jr.*  
4 April 2011

SUBJECT: Alternative Dispute Resolution

Recent activities concerning the Federal budget have made it clear how important it is for government to maximize productivity and reduce costs. In doing so, we need to examine and address the impact that unresolved conflicts have on our efficiency and mission accomplishment.

During periods of change, conflict is inevitable. Potential conflicts, arising among our employees, contractors, or stakeholders, may involve employment issues, the health and safety of employees, environmental matters, technology transfer issues, regulation, or enforcement. While conflict can be the gateway for improved communication and collaboration, we should strive to prevent unresolved issues from slowing our work or making it more costly to the taxpayers.

DOE strongly supports the use of Alternative Dispute Resolution (ADR) as a way to prevent or minimize disputes, or to resolve disputes at the earliest stage possible, in a timely, cost-effective manner. ADR encompasses a variety of techniques, including mediation, facilitation, fact finding, group conflict management, and conflict coaching.

DOE's Office of Conflict Prevention and Resolution (OCPR) — now part of the Office of Hearings and Appeals — stands ready to assist DOE components and contractors in exploring efficient means of preventing conflicts and resolving disputes through use of appropriate ADR. In addition to consulting and developing programs that employ alternative means of conflict prevention and dispute resolution, OCPR designs and delivers customized training in communication and negotiation techniques. All of these skills are essential in working productively to accomplish DOE's mission and possibly avoid the excessive costs of protracted litigation.

While some disputes ultimately may not be resolved through ADR, I encourage employees and managers to attempt mediation and any other ADR techniques to resolve conflict at the earliest possible opportunity. Participation in mediation is always voluntary; however, if an employee requests mediation, managers are expected to participate, absent unusual circumstances. Effective communication, collaboration, and dispute resolution, both inside and outside DOE, are essential to our success as an Agency. I strongly urge employees and managers across the complex to call upon OCPR and learn how it can assist managers in preventing or resolving any conflict. OCPR may be reached at (202) 586-6972.





